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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CAROLYN SPAULDING,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

On Application for a Writ of Certiorari to the Supreme Court of Louisiana

PETITION FOR A WRIT OF CERTIORARI

JAY C. ZAINEY
Attorney for Petitioner
McPHERSON & ZAINEY
5641 Canal Boulevard
New Orleans, LA
Tel.: [504] 488-6651

THE ISSUE PRESENTED

Whether the Trial Court correctly quashed (dismissed) a bill of information predicated upon the hearsay representations of a confidential informant to an undercover narcotics officer when the confidential informant had made an affidavit swearing that he had stolen the prescription drugs prescribed for defendant from the defendant's purse and subsequently misrepresented to the undercover officer that defendant had sold the drugs to him, the defense moved to have the confidential informant declared to be a material witness, the court issued a material witness warrant and, after several delays of the trial date because the witness had not been found and compelled to attend the trial and/or give his testimony in this matter, the witness was unavailable to the defendant and the State failed to show the

type of effort it would have utilized to locate a witness it desired to have attend and testify on the trial of this cause.

DECLARATION REGARDING PARTIES

There are no parties to this litigation other than the State of Louisiana and Caroyln Spaulding, the respondent and petitioner, respectively.

This case involves an informant whose name is Kevin Michael Morris.

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May It Please the Court:

Petitioner, Carolyn Spaulding, respectfully petitions this Honorable Court for a writ of certiorari to review the ruling of the Supreme Court of Louisiana entered in these proceedings on the 17th day of June, 1983, denying a petition for a writ of certiorari to review the order

of the Louisiana Court of Appeal for the Fifth Circuit granting the State of Louisiana's petition for a writ of certiorari to review an order of the 24th Judicial District Court for the State of Louisiana in which the Trial Judge quashed a bill of information filed against the petitioner when the State failed to utilize reasonable efforts to execute a material witness warrant issued for the appearance and testimony of an informant who had made an affidavit stating that he had stolen the drugs from the petitioner which formed the basis of the bill of information charging petitioner with distribution of controlled dangerous substances.

THE OPINIONS BELOW

On June 17, 1983, the Supreme Court of Louisiana denied petitioner's application for a writ of certiorari. That Memorandum Order, as yet unpublished, is marked "Appendix A" and reproduced herein

at page A-1 of the Appendix to this Petition.

On May 3, 1983, the Louisiana Court of Appeal for the Fifth Circuit granted the State's application for a writ of certiorari and reversed the Trial Court's ruling granting petitioner's motion to quash, setting forth as reasons therefor:

> There has been no showing of any prosecutorial misconduct nor any fault on the part of the state for the non-appearance of the witness.

That Memorandum Order, as yet unpublished, is reproduced herein as "Appendix B" at page A-2 of this Petition.

There was not written opinion of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, granting petitioner's motion to quash the bill of information.

GROUNDS ON WHICH THE SUPERVISORY JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Louisiana, denying petitioner's application for a writ of certiorari, was made and entered on the 17th day of June, 1983. No application for rehearing is available from the denial of an application for discretionary review in the Supreme Court of Louisiana. Rule IX, §6, Louisiana Supreme Court Rules.

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. §1257(3)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Compulsory Process Clause of the Sixth Amendment to the United States Constitution, made applicable to and enforceable against the States through the Fourteenth Amendment Due Process Clause of the United States Constitu-

tion in Washington v. Texas, 388 U.S. 14 (1976). This case also involves the concept of fundamental fairness, guaranteed under the Fourteenth Amendment's Due Process Clause. The case also involves the Louisiana statutes pertaining to the procurement of a material witness by the defendant in effectuation of a defendant's right of Compulsory Process under Louisiana law.

The Compulsory Process Clause of the Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor * * *.

The Fourteenth Amendment's Due Process Clause provides:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *.

Louisiana Revised Statutes of 1950, Title 15, Sections 257-259, provide:

§257. Whenever it shall appear, upon motion of the district attorney or upon motion of a defendant supported by his affidavit, that the testimony of any witness is essential to the prosecution or the defense, as the case may be, and that there are good grounds to fear that said witness may depart or be taken from the jurisdiction of the court, a judge, as defined in Article 931 of the Code of Criminal Procedure, shall issue a warrant for the arrest of the witness. The witness shall be arrested and held in the parish jail, or such other suitable place as shall be designated by the court, until he gives an appearance bond as provided for defendants when admitted to bail, or until his testimony shall have been given in the cause or dispensed with.

§258. When any witness in any criminal case, imprisoned in default of giving bon for his appearance, shall wish to have his testimony taken and to be enlarged, he shall apply to the judge of the court in which such prosecution is pending to have his testimony taken in writing; and thereupon the judge shall order said testimony to be taken in writing before him in court or in chambers or before any officer authorized by law to administer oaths, after giving forty-eight hours personal notice to the accused and to the district attorney to be present at the time and place of the taking of said testimony; provided, that with the consent of the district attorney and of the accused any and all delays for the taking of said testimony may be waived. If the accused is in jail,

the sheriff shall be notified and shall produce the accused at the time and place designated to be confronted with the witness. The testimony when so taken shall be sworn to and signed by the witness if he knows how to write, if not, by his ordinary mark attested by the officer taking the testimony; and the said testimony so certified to shall be without delay returned by the officer taking the same into the court in which said prosecution is pending, together with the said notice and the officer's return of service annexed thereto, and thereupon the said witness shall be discharged from custody.

The taking of this testimony shall be without expense to the witness, but shall be taxed as a part of the costs of the prosecution.

§259. The testimony taken as provided for in R.S. 15:258, when certified to by the officer before whom taken, shall, in case of the death or departure of the witness from the parish or other inability to attend court, be admissible before the grand jury as well as on the trial of the accused, subject to all legal objections, but shall not be admissible when the presence of the witness can be procured by subpoena; provided that whenever an accused, not in jail, shall have been duly notified to be present at the taking of said testimony and shall not attend, he shall not be allowed to set up the plea that he had been deprived of his right to be confronted with the witnesses against him.

STATEMENT OF THE CASE

In the present case, a confidential informant stole drugs from petitioner's purse. Those drugs, generically known as Methamphetamine and sold under the trade name of Desoxyn, were prescribed for petitioner's obesity by Dr. Calvin J. Jackson of New Orleans on June 4, 1982. The prescription was filled that date by a pharmacist, C. Anderson, at the Jackson Avenue Pharmacy in New Orleans. A copy of the label and receipt have been furnished to the State in reciprocal discovery procedures and the State has never contested that Ms. Spaulding legally possessed the said drugs.

On June 22, 1982, prior to the arrest and formal accusation of the petitioner, the confidential informant, Kevin Michael Morris, was confronted by petitioner and accused of stealing petitioner's prescription medication which could not be re-

filled for several days. The said confidential informant then disclosed to the petitioner what had happened. The informant told petitioner he had been arrested for distribution and had made a deal with the police to get other drug dealers in lieu of his own prosecution. The petitioner was in the presence of another person who had been falsely accused by the informant. That person had been charged with the conduct attributed to him by the informant and had an attorney retained to represent him on those charges. That person asked the informant to accompany him to his attorney's office and tell his attorney what the informant had told him. The informant agreed to do so and, when he went to the attorney's office, agreed to make an affidavit on behalf of the attorney's client as well as petitioner herein setting forth what happened, which affidavit he did provide on June 22, 1982. A copy of the said

affidavit is annexed hereto as Appendix C, page A-4, post. The petitioner has not since seen the said confidential informant.

On July 8, 1982, petitioner was arrested and charged with possession of a controlled dangerous substance and distribution of that substance. She then retained counsel (not undersigned counsel) who showed the receipt and label and affidavit to the District Attorney's Office. The affidavit alleged that the ten doses of Desoxyn had been stolen by the confidential informant "on or about the 15th of June, 1982." The District Attorney then refused the charge of possession of the drugs but charged that "on or about the ninth day of June" petitioner "did knowingly and intentionally distribute a controlled dangerous substance, to-wit: Methamphetamine (10 Desoxyn) * * *."

The State, pursuant to the requirements of Roviaro v. United States, 353 U.S. 53 (1957), and McCray v. Illinois, 386 U.S. 300 (1966), acknowledged that Kevin Michael Morris was its confidential informant to whom it alleged that petitioner distributed the Desoxyn.

Trial of this matter was set to commence on November 15, 1982. Trial on that date was not had because the confidential informant was not being called by the State, as defense counsel had expected, and the witness' testimony was essential to the defense of the case. The State alleged that the witness had absconded and was not available.

On November 17, 1982, defense counsel filed a motion seeking to have the confidential informant declared to be a material witness and arrested pursuant to La. R.S. 15:257 et seq., set forth verbatim in a previous part of this Petition. It

was that form of compulsory process of the confidential informant's testimony which petitioner implemented by her motion to have the witness declared to be a material witness. On December 8, 1982, the motion was heard and the Trial Court issued an attachment for the material witness.

Trial was scheduled for January 17, 1983. The defendant appeared for trial. The District Attorney moved for a continuance of the trial and trial was rescheduled to commence on January 20, 1983 due to the absence of the confidential informant. That latter trial date was continued because of the absence of the witness and reset for February 28, 1983. On motion of the defense on February 2, 1983 and again on February 23, 1983, the hearing on the petitioner's motion to suppress was continued due to the absence of the confidential informant who was a material witness in connection with that motion.

On February 28, 1983, on joint motion of the State and petitioner, the February 28th trial date was continued and reset for March 4, 1983. When the material witness had not been located by March 4, 1983, defense counsel orally moved the Court to quash (dismiss) the indictment. A hearing was had on that motion, after which the Court granted petitioner's oral motion and ordered petitioner to supplement the record with a formal written motion and proposed order.

At the hearing, the original affidavit of the confidential informant was admitted in evidence with leave to substitute a copy thereof. (Tr. 2) The defense argued that it was "incumbent upon the State to keep better reins on Mr. Morris." The defense argued that the State had made no diligent effort to locate the witness and secure his attendance at the tri-

al of this matter. (Tr. 3) The State responded (Tr. 3-5):

MR. LOEB (the prosecutor):

> Your Honor, may it please the Court, I will agree with defense: Mr. Morris is indeed a material witness. At the time of the transaction, he was acting in the capacity as an undercover agent or under investigation for the Sheriff's Office. He was a confidential informant at the time. He did set up the deal. He was present at the time the transaction occurred and under the jurisprudence, I would be required to disclose his name, if the defense did not know him. There is no question, that he is a material witness. In view of that, the State has made every effort to locate Mr. Morris. We have joined in the request for the attachment. I have ordered the Sheriff's Office to give us every piece of information they have with regard to his whereabouts. They have supplied that. I have sent police units to all the addresses that we have for him in an attempt to locate him. We have done everything we could to locate the witness and have not been able to do that. Other than that, Your Honor, the State is ready for trial and we would proceed to trial on the drug charges against the defendant.

THE COURT:

> This individual was a confidential informant?

MR. LOEB:

Yes, sir.

THE COURT:

Do you know whether it was paid or not?

MR. LOEB:

No, your Honor. I can't state whether he was paid on this particular transaction or not. I do have information that would lead me to suspect, he may have been paid for his confidential information, but I don't think it was in this particular case.

THE COURT:

The motion is granted. Would you please follow it up with a written motion to quash?

One month and two days later, the State filed a Notice of Intention to apply for supervisory writs to review the ruling of the Trial Court quashing the bill of information. No notice of intent was furnished defense counsel. The Trial Court fixed a return date of April 26, 1983, for the filing of that application. That application was filed on the last day of the

period allotted. On May 2, 1983, defense counsel responded to the State's application, urging that petitioner was prejudiced by the absence of the favorable material witness' testimony and that the State had the responsibility for producing the witness since the witness had worked for the State as a confidential informant. Defense further contended that the showing made by the State did not constitute proof of the diligent search to locate the missing material witness which was required under Louisiana jurisprudence which was predicated upon the right to have the compulsory process of favorable defense witnesses.

On May 3, 1983, the Louisiana Court of Appeal for the Fifth Circuit granted the State's application for a writ, issuing the following reasons for its judgment:

> There has been no showing of any prosecutorial misconduct nor any fault

> on the part of the state for the non-appearance of the witness.
>
> Accordingly we reverse the trial court's granting of the defense's motion to quash and reinstate the bill of information against the defendant and remand the matter to the trial court for further proceedings.

On May 23, 1983, petitioner applied to the Louisiana Supreme court for a writ of certiorari to review the ruling of the Louisiana Fifth Circuit Court of Appeal. The same grounds were urged as a basis for reversing the ruling of the Court of Appeal. On June 17, 1983, that application was denied without explication therefor.

Trial of this cause has now been reset in this matter. To our knowledge, the State has made no further effort to locate the missing witness. Upon filing of this application in this Honorable Court, petitioner will seek a continuance or stay of the proceedings in the Trial Court pending the hearing of this application by this

Honorable Court. Should the Trial Court fail to continue, or the Louisiana appellate courts should fail to stay these proceedings, an application will be promptly submitted to Mr. Circuit Justice White for a stay of these proceedings pending review by this Court of petitioner's application herein. Because of the proximity to the trial date of the filing of this petition, we respectfully request that this Petition be considered as a Motion for a Stay of the Proceedings in the Trial Court in the event it should be necessary to wire this Court for such relief.

REASONS FOR ALLOWING THE WRIT

This case presents an important, recurring question of federal constitutional criminal procedure which has not been, but should be, decided by this Court.

In Roviaro v. United States, 353 U.S. 53 (1957), this Court was called upon to decide the applicability of the "in-

former's privilege" in a situation where the informant was the participant and sole witness to a drug transaction who could testify about the accused's conduct in that case. A Government agent was concealed in the trunk of an automobile and other surveilling agents watched the transaction, but no single witness other than the informant could describe the entire transaction. The defense sought production of the name and address of the informant prior to trial and the trial court refused to order the Government to produce such information. This Court noted (353 U.S. at 62):

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors.

After analyzing those factors in the circumstances of that case, this Court said (353 U.S. at 64-65):

> This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. Moreover, a government witness testified that Doe denied knowing petitioner or ever having seen him before. We conclude that, under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of repeated demands by the accused for his disclosure.

Immediately following the above quoted language, this Court said (353 U.S. at 65 n. 15):

> * * * we think that the court erred also in denying, prior to the trial, petitioner's motion for a bill of particulars, insofar as it requested John Doe's identity and address. Since Count 1 was then before the court and expressly charged petitioner with a sale of heroin to John Doe, it was evident from the face of the indictment that Doe was a participant in and a material witness to that sale. Accordingly, when his name and address were requested, the

Government should have been required to supply that information or suffer dismissal of that count.

Many of the elements of the Roviaro case on which the reversal of that conviction for non-disclosure of the informer's identity and address turned are present in the instant case. The differences, even more than the circumstances of Roviaro, favor disclosure. In the present case, the informer, who was a mere nodding acquaintance of the accused, stole prescription drugs from petitioner's purse and, in order to benefit himself in charges pending against him, told an undercover police officer he had purchased or obtained the drugs from petitioner. The informant was the sole witness that the transaction did not occur in the manner he told the officer it did. Fortuitously, the petitioner was with another person against whom the informer had given false information. When confronted by that person in the peti-

tioner's presence, the informer agreed to speak with the other person's attorney. After the informant was interviewed by Mr. Ralph Capitelli, Esq., a former State Assistant District Attorney who is now engaged in a criminal defense practice, the informer was asked to make and agreed to make an affidavit exonerating not only the client of Mr. Capitelli but also the petitioner herein. The petitioner had asked the informant about some drugs missing from her purse but had no idea, prior to the informant's admission, that the informant had stolen those drugs for the purpose of setting her up for a charge of distribution of drugs. The affidavit was presented to the trial judge as a basis for securing a material witness warrant for the arrest and production of the informant as a defense witness after charges were made against the petitioner and the informer could not be located by defense

counsel. The informant has never been taken into custody under that warrant and his testimony is not available to the petitioner on a trial of this cause.

Clearly, if the petitioner had not discovered the identity of the informant, the petitioner would have had the right to have the State disclose to it the identity of the informant if the Roviaro rule has a constitutional basis and is applicable against the States under the Fourteenth Amendment's Due Process Clause.

In McCray v. Illinois, 386 U.S. 300, 309 (1967), this Court declared that Roviaro was decided under this Court's supervisory jurisdiction over lower federal courts. While that might have been the power asserted to make the ruling it did, the foundation of the Roviaro case was the concept of fundamental fairness and the constitutional right to prepare a defense. Incident to the right of preparing

a defense is the right, once a defense is discovered, to compel the attendance and favorable testimony of witnesses for the accused. We submit that Roviaro merely provided an enabling rule for the initial stages of the assertion of the right to have the compulsory process of favorable witnesses, i.e., the right to interview the witnesses and discover if their testimony would be favorable. It is significant that, in Roviaro, there was no assurance made that the informant's testimony would be favorable. Yet this Court held that it was prejudicial error because fundamentally unfair to the defense to deny disclosure of the identity and whereabouts of a person who "might" be able to refute the testimony of federal police authorities. In the present case, there is no need for disclosure of the identity of the informant for the purpose of discovering whether his testimony would be favor-

able. He has made an affidavit to that effect. His testimony would clearly be favorable to the petitioner on the issue of her guilt of any phase of the transaction alleged against her on the basis of the previous hearsay representations of the informant to an undercover police officer.

In McCray, the informant was not a participant and was a mere tipster upon whose information a successful search under a search warrant was predicated. This Court held that his testimony would not have been material to the issue of guilt or innocence, hence the nondisclosure of his identity would not be fundamentally unfair. At best, disclosure was useful to dispute the assertions made to establish probable cause. No basis for disbelieving the affiant officers was asserted. This Court held that Roviaro was inapplicable where the issue was a preliminary one of probable cause, rather than the issue of

guilt or innocence. Hence, this Court has never decided, but should now decide, whether there is a constitutional necessity under the due process concept of fundamental fairness for the rule of Roviaro.

McCray, like so many other cases dealing with asserted applications of Roviaro, also dealt with a frivolous assertion of the right of confrontation and cross-examination of the informer in his role as a Government witness on the issue of probable cause. Quoting from Cooper v. California, 386 U.S. 58, 62 (1967), this Court held it was not a violation of the Confrontation Clause of the Sixth Amendment for the Government not to produce an informant to testify against the accused. McCray does not deal with the constitutional issues discussed in Roviaro and presented by this case, viz., fundamental unfairness in forcing an accused to trial without the benefit of an

informant's favorable testimony when the informant is the only witness other than the accused who can testify concerning whether petitioner distributed or the informant stole from petitioner the drugs for which the informant received $100.00 when he told the undercover police agent that he had obtained them from petitioner.

Roviaro required the disclosure of the identity and address of the informant, upon request therefor, when the informant's testimony was material to the accused's innocence. Discussing various limitations upon the informer's privilege, this Court said (353 U.S. at 60-61):

> A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informant's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations, the trial court may require disclosure and, if the Government withholds the information, dismiss the action. * * *

Clearly, the fundamental fairness concept adverted to in Roviaro as a basis for its decision requires, in a State prosecution, that the rule of Roviaro and its progeny be applied in State proceedings.

The present case seeks an extension of the Roviaro case, consistently with the Compulsory Process Clause of the Sixth Amendment which is applicable to and enforceable against the States through the Due Process Clause of the Fourteenth Amendment. See Washington v. Texas, 388 U.S. 14 (1967); Webb v. Texas, 409 U.S. 95 (1972). While the Roviaro case dealt sufficiently with the issue then before the Court, it stopped short of the present situation because it was not known whether the informant would be a favorable witness because defense counsel had been unable to obtain his identity and interrogate him. In the present case, the identity of the

informant was known, although not his whereabouts, and it was known that his testimony would be favorable. This case, then, clearly involves the accused's right to have the compulsory process of a Government informant who is known to have evidence favorable to the accused. In aid of the assertion and enforcement of that right, this case deals with the right of the accused to have the full use of the compulsory process of the Government to obtain the presence and favorable testimony of that witness on behalf of a defendant. That issue has not been, but should be, decided by this Honorable Court.

Under the Roviaro rule, the defense bears the burden of demonstrating its need for disclosure of the identity and/or whereabouts of an informant. United States v. Whitney, 633 F.2d 902, 911 (9 Cir. 1980), and cases cited therein; United States v. Tousant, 619 F.2d 810,

813 (9 Cir. 1980). That burden may be satisfied by showing that the informant is a material witness, Roviaro, supra; United States v. Bonilla, 615 F.2d 1262, 1264 (9 Cir. 1980), or that the informant's testimony is crucial to the defense. United States v. Harper, 609 F.2d 1198, 1199 (6 Cir. 1979). The Roviaro rule does not require disclosure of the identity of a "mere tipster" who furnished information about the accused's involvement but whose information was not an element of proof in the government's case. McCray v. Illinois, supra; United States v. Larson, 612 F.2d 1301, 1304 (8 Cir.), cert. den., 446 U.S. 936 (1980); United States v. Arrington, 618 F.2d 1119, 1125 (5 Cir. 1980), cert. den., 449 U.S. 1086 (1981).

The affidavit of the informant in this case clearly establishes that his testimony is crucial to the defense. There-

fore, if his name were unknown it would be necessary for the State to identify him and to disclose his whereabouts, unless the disclosure of his whereabouts could subject the informant to possible harm. Where the latter situation exists, the State may withhold the informant's address from the defense but make the informant available to the defense prior to trial unless the informant refuses to submit to a pretrial interview. United States v. Hernandez, 608 F.2d 741, 744-745 (9 Cir. 1979); United States v. Hansen, 569 F.2d 406, 410 (5 Cir. 1978); United States v. Rangel, 534 F.2d 147, 148 (9 Cir.), cert. den., 429 U.S. 854 (1976); United States v. Bonilla, supra, at 1264.

When the defense is entitled to the identity and information pertaining to the whereabouts of the informant, the request for his identity and address should put the government on notice of the defense's

desire to at least interview the witness and thus impose the obligation upon the government to keep itself informed of the witness' whereabouts until the time of trial. That, however, has not always been the result under the jurisprudence. Compare United States v. Jones, 492 F.2d 239, 242 (3 Cir. 1974); United States v. Leon, 487 F.2d 389 (9 Cir 1973); United States v. Barnes, 486 F.2d 776 (8 Cir. 1973); Velarde-Villarreal v. United States, 354 F.2d 9 (9 Cir. 1965); United States v. D'Angiolillo, 340 F.2d 453 (2 Cir. 1965); United States v. Clarke, 220 F.Supp. 905 (E.D.Pa. 1963), with United States v. Hernandez, supra, and United States v. Bonilla, supra. All too often, the government refuses to disclose the whereabouts of a witness when it knows where the witness is, then loses contact with the witness before trial and is unable, through the most diligent effort, to

locate him. The frequent result is for the courts to hold that the last-minute diligent effort by the government satisfies the government's obligation, completely overlooking or excusing the fact that, but for the government's earlier lack of cooperation the witness would have been available to the defense for the purpose of interview and, if his information was helpful, for testimony as a defense witness either at the trial or, as sought by petitioner herein, pursuant to a material witness procedure under La.R.S. 15:257 et seq. Illustrative of such situations where the government's undisclosed information about the witness' whereabouts or its failure to make the witness available upon request to the defense has been followed by such loss of contact and subsequent judicial rulings as petitioner submits to be fundamentally unfair and inconsistent with the Due Process requirement of such fair-

ness are the cases of United States v. Hernandez, supra; United States v. Bonilla, supra; and United States v. Hargrove, 647 F.2d 411, 414-415 (4 Cir. 1981).

In the Hargrove case, after a defendant had requested a subpoena issue for a known informant the defense was unable to locate, the informant called a government agent to find out why a Marshal (who was attempting to serve the subpoena) had been doing at his parents' home. The agent informed the informant that a subpoena had been issued for his appearance at the trial. The agent did not instruct the informant to come to the trial the next morning to testify for the defense. The next morning, the Marshal advised the Court that he had been unable to serve the subpoena. The agent did not inform the Court that he had had a conversation with the informant the evening before and had

not told the informant to appear in Court in response to the subpoena issued on behalf of the defense. The defendant was thus unable to obtain the presence of the informant and his testimony at the trial. Of his own volition, the informant went to the United States Attorney's Office the next day after speaking the evening before with the agent, but too late to benefit the defendant. The parties had commenced their summation and the United States Attorney conducting the trial had not been informed of the informant's presence in his office. The opinion does not disclose whether the agent knew that. The Fourth Circuit, as many other courts in similar circumstances have done, held (647 F.2d at 415):

> Although the government must make a reasonable effort to secure an informant's presence at trial, it is not required to guarantee that he will appear. United States v. Leon, 487 F.2d 389, 392 (9 Cir. 1973). Here the government made a reasonable effort to obtain the in-

> formant, and the trial court properly held that it was not guilty of any concealment.

While it might have constituted a reasonable effort to instruct the informant to appear in court and, if he did not follow those instructions, to attribute his non-appearance to his own volition rather than the government in the same way as any other subpoena-dodging witness, we submit that the government's "effort" was "unreasonable" and even negligent to the point of fault when its agent, having the informant on the telephone and knowing that a subpoena had issued for his attendance at the trial, failed to instruct the informant to come to court. Inadequate or inept efforts to secure the attendance of informants are frequently excused with the result that the defense is deprived of their valuable testimony when such is favorable to the accused. The constitutional right of compulsory process for the at-

tendance of favorable witnesses for the accused should not be so easily circumvented or denied.

It has been held that the government bears the burden of showing that it has made a reasonable effort to obtain the informant for trial when requested or ordered to do so. See United States v. Kitchen, 480 F.2d 1222, 1223 (8 Cir. 1973); United States v. Pollard, 479 F.2d 310 (8 Cir. 1973); Velarde- Villarreal v. United States, supra, 354 F.2d at 13; United States v. Clarke, supra. The reasonableness of its effort, however, should be gauged by the same factors as this Court held to be necessary to require disclosure of the informant's identity, plus an analysis of the effort made in light of the importance to the defense of having the informant's testimony.

The courts have consistently held that the accused is entitled to have the

informant's testimony when the defense is that the informant entrapped the accused or is a witness to such entrapment by the government agents. See Velarde- Villarreal v. United States, supra at 12, citing United States v. White, 324 F.2d 814 (2 Cir. 1964). This case presents more than mere speculation about the nature of the informant's testimony. Cf. United States v. Tousant, supra. The informant's testimony, were he available to testify under compulsory process faithfully executed, would be that the informant stole the drugs from petitioner and sold them to a person he knew to be an undercover agent and falsely told the agent the petitioner had distributed those drugs to him. In an entrapment situation, the accused has at least performed the acts charged to be criminal and only the issue of his intent is presented. Here, the informant's testimony would establish

that the petitioner did not do the act with which she is charged. No testimony in this entire case could be more crucial to the defense or devastating to the prosecution.

What efforts were made in this case to produce the informant and to permit the petitioner to have the benefit of his testimony which would have been devastating to the government which is charged with locating and producing him? We submit that the government's obligation is to do justice, not just to prosecute and put people away, and that where such allegations as those presented by the informant's affidavit would make it appear that an injustice would be done by continuing with a prosecution in the absence of the informant, the State should have been just as willing to search for and secure the presence of the informant as it would have been had the in-

formant been a witness essential to its case.

The informant's presence in this case was not sought by a last-minute instanter subpoena. It was not even sought by an ordinary subpoena. It was sought by a material witness warrant after legal proceedings had been conducted and the witness had been determined to be a material witness who was not likely to show up at the trial. We believe that where an accused can convince a trial court judge that a material witness warrant is necessary to protect and preserve his right of compulsory process of the witness, the order of arrest made by the trial judge should be pursued and executed with the same vigor as the State would have pursued and executed an arrest warrant for a criminal accused. The likelihood of doing an injustice to the accused is, we believe, equally important to be abated as the fur-

ther criminal conduct by a person for whom the police hold an arrest warrant. In the latter case, the individual rights of perhaps this writer or even a Justice of this Court, with the more general public right to domestic tranquillity and freedom from the fear of crime, might be involved; in the case of prosecution of persons with absent government informers who could disprove the charges against the accused who has requested their arrest and appearance, however, it is the Compulsory Process Clause of the United States Constitution, the organic law of this Nation, which is being violated. Permissive violation of constitutional rights, especially the right to defend oneself with favorable witnesses for whose conduct the government is vicariously if not actually responsible, would liken our Government to that of Poland or the Soviet Union or the hated Nazi regime of Germany. This Court's high-

est duty is to preserve and protect the Constitution of the United States of America and thereby preserve the form of freedom and fair trial which is the dominant claim we have over any other nation in the world to justify our belief that we have the best Government on the face of the Earth. If we cannot expect such protection from our Courts, both State and Federal, then we have no right to make the claims we do about the fairness of our system. But much worse than that, we do not have a fair system!

The effort of the State, summarized by the Assistant District Attorney but not actually shown by any evidence taken under oath, was (Tr. 4):

> * * * the State has made every effort to locate Mr. Morris. We have joined in the request for the attachment. I have ordered the Sheriff's Office to give us every piece of information they have with regard to his whereabouts. They have supplied that. I have sent police units to all the addresses that we have for him in an attempt to locate him. We

> have done everything we could to locate the witnesses [sic] and have not been able to do that. * * *

The State's obligation in the present situation was greater than that involving an ordinary subpoena. The State had the obligation to utilize the powers of the State and to seek the cooperation of the Federal Government to locate the witness, as it would have done if it wanted the witness for use on the trial of this cause. The trial court ordered the State to exercise its arrest powers to obtain the attendance and testimony of the witness. The State did not utilize those resources. Instead, it relied upon a lesser procedure similar to that it would expend in serving a routine subpoena on a witness who was expected to attend and testify at the trial. The informant had already demonstrated his intent to avoid testifying in this case by absconding after furnishing the favorable affidavit. The effort

expended by the State to locate the informant in this case was ineffective to even obtain his presence if he were living openly in the adjacent Parish of Orleans, i.e., the City of New Orleans.

The effort required to be expended was that necessary to effectuate the order of the Court to arrest the witness. At the very least, that involved putting his name, identifying data and the fact he was wanted as a material witness into the National Crime Information Center computer so that law enforcement officers outside of Jefferson Parish Louisiana would know he was wanted if he should come into contact with them. Certainly, a telephone call to the New Orleans Police Department and the Federal Bureau of Investigation--efforts which would have been utilized if the witness had been wanted by the State to testify against the petitioner--seeking their assistance in apprehending and pro-

ducing the informant at the trial of this cause was a minimal due process requirement under the Compulsory Process Clause as extended to and enforceable against the States through the Fourteenth Amendment. The effort expended in this case was no where near what it would have been if the State had wanted the witness. Since the witness' attendance and testimony was crucial to the defense, and to a fair trial, the effort expended by the State was not reasonable to produce the witness for purposes of satisfying the Compulsory Process requirement of due process.

Velarde-Villarreal has been most frequently quoted as the basis for ascertaining whether the government has fulfilled its obligation of compulsory process to obtain the presence of an informant. In that case, the Court said (354 F.2d at 13):

> We therefore hold that the cause should be and it is remanded to the

> trial court for the purpose of holding a further hearing at which the Government shall be given the opportunity of proving if such be the case that it was genuinely unable through reasonable efforts to produce [the informant] and also, if such be the case, that the Government did not take steps to see to it that [the informant] would be or become unavailable as a witness. The burden of proving these things should be on the Government. * * *

In the Louisiana Court of Appeal for the Fifth Circuit, the Court did not deal with the issue whether the State "was genuinely unable through reasonable efforts to produce [the informant]." It did not deal with the issue whether the efforts expended were reasonably adequate to satisfy the accused's right of compulsory process of an informant who, at the time of the incidents about which he was sought to testify, he was in the employ of the State. The Court decided, instead, that:

> There has been no showing of any prosecutorial misconduct nor any fault on the part of the state for the non-appearance of the witness.

Significantly, it was not the accused's burden to prove that there had been such misconduct or fault on the part of the prosecution. The burden is on the State to prove that it was not guilty of such misconduct or fault. That was not proven on the record of these proceedings. Moreover, the issue presented in these proceedings was the burden upon the Government to locate and produce the witness under the circumstances where a material witness warrant had been issued for his arrest. Clearly, the issue before the Louisiana courts, which was decided only by the Trial Court and not by the State appellate courts, was whether the State had expended the proper effort to obtain the witness and whether it was responsible for producing him. Under the circumstances of this case, we submit that the Government had such an obligation and that it failed to perform it, thus exposing it to the very

sanction the Trial Judge imposed for its laches.

In Velarde-Villarreal v. United States, supra, at 13, the Court said:

> [s]ince the Government chooses to utilize such agents, with the attendant risk of entrapment, it is fair to require the Government which uses this inherently dangerous procedure to take appropriate precautions to insure that no innocent man should be punished.
>
> * * * * * * * * * * * * * *
>
> If [the informant] is available for hire, he should be available to come and testify. . . . We think whether there was a failure to expend every reasonable effort to obtain the witness is a question of fact for the trial judge.

See, also, United States v. Pollard, 483 F.2d 929, 931 (8 Cir. 1973), cert. den., 414 U.S. 1137 (1974). In the instant case, the trial judge concluded that every reasonable effort was not made and quashed the bill of information. There had been no trial, so the remedy could not have been a new trial. The case had been

continued on several occasions while an effort was supposed to have been made to secure the witness. The effort shown was not one designed to locate a witness who had moved into the adjacent parish, much less one who might have been attempting to avoid being called to give his testimony on this matter. In Roviaro, this Court recognized dismissal as the proper remedy when the government refused to identify or furnish the address of a material witness informant. 353 U.S. at 60-61. It was not even known whether the witness' testimony would be favorable to the defense. Where the trial had been continued several times and no reasonable effort consistent with one the State would have used to obtain a witness favorable to it had been made, the trial court in this case acted properly to quash (dismiss) the bill of information against the petitioner.

The ruling of the trial court which quashed the bill of information was not a determination on the merits or a former jeopardy which would bar reinstitution of the prosecution under circumstances where the State could afford petitioner's constitutional right of compulsory process of the informant. The State would be free to file another bill of information and resume this prosecution if it should secure the informant's presence at a trial of this case. It was not a reasonable option to require that the petitioner be subjected to a patently unfair trial, as the State announced its readiness to commence.

CONCLUSION

For the foregoing reasons, this Honorable Court should grant a writ of certiorari and review the judgement below. After due proceedings herein, this Court should vacate the orders of the Supreme Court of Louisiana and of the Louisiana

Court of Appeal for the Fifth Circuit and reinstate the order of the trial judge quashing the bill of information without prejudice to reinstituting a prosecution upon a new bill of information if the State should obtain the presence and attendance of the informant as a defense witness at any trial of such charges, relying upon the limitation upon reinstituting such prosecutions under applicable Louisiana law.

JAY C. ZAINEY
Attorney for Petitioner
McPHERSON & ZAINEY
5641 Canal Boulevard
New Orleans, LA
Tel.: [504] 488-6651

CERTIFICATE OF SERVICE

I, Jay C. Zainey, counsel of record for Carolyn Spaulding and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ____ day of July, 1983, I served three copies

of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Louisiana on the Attorney General of the State of Louisiana and upon the counsel for the State of Louisiana who has represented the State of Louisiana in these proceedings below, as follows:

Attorney General of Louisiana
Capitol Station Post Office
Baton Rouge, Louisiana

Mr. David Loeb
Ms. Andrea M. Price
Assistant District Attorneys
24th Judicial District
Office of the District Attorney
New Courthouse Annex
Gretna, Louisiana 70053

It is further certified that all parties required to be served have been served.

JAY C. ZAINEY
Attorney for Petitioner
McPHERSON & ZAINEY
5641 Canal Boulevard
New Orleans, LA
Tel.: [504] 488-6651

APPENDIX "A"

SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA

vs. NUMBER 83-KK-1117

CAROLYN SPAULDING

- - - - - -

In Re: Carolyn Spaulding, applying for Writ of Certioraro to the 24th Judicial District, Number 82-2522, from the Fifth Circuit Court of Appeal, Number 83-K-419, Parish of Jefferson.

- - - - - -

June 17, 1983

Denied

JLD
JAD
WFM
FAB
JCW
HTL

Supreme Court of Louisiana
June 17, 1983

s/ Frans LeBranche
Clerk of Court
for the Court

APPENDIX "B"

NO. 83-K-419

COURT OF APPEAL, FIFTH CIRCUIT
STATE OF LOUISIANA

April 26, 1983
s/ Illegible
Dy. Clerk

STATE OF LOUISIANA

versus
CAROLYN SPAULDING

In Re STATE OF LOUISIANA Applying for WRIT OF REVIEW FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, JEFFERSON PARISH, NO. 82-2522, THE HONORABLE JUDGE JAMES CANELLA

Gretna, La.
May 3, 1983

WRIT GRANTED.

There has been no showing of any prosecutorial misconduct nor any fault on the part of the state for the non-appearance of the witness.

Accordingly we reverse the trial court's granting of the defense's motion to quash and reinstate the bill of information against the defendant and remand the matter to the trial court for further proceedings.

/s Judge Lawrence A. Chehardy
/s Judge John C. Boutall

/s Judge Edward A. Dufresne, Jr.

A TRUE COPY

GRETNA, May 3, 1983
/s Illegible -- Dy. Clerk
Court of Appeal, Fifth Circuit

APPENDIX "C"

SWORN STATEMENT AND AFFIDAVIT OF ONE KEVIN MICHAEL MORRIS

NOW BEFORE ME, CAMERON GAMBLE, A DULY SWORN NOTARY PUBLIC IN THE PARISH OF ORLEANS AND THE STATE OF LOUISIANA, COMES ONE

KEVIN MICHAEL MORRIS

who personally swore and stated to be true that:

The statement that I hereby do attest to is made of my own free will, absent any form of threat or coersion [sic] of any kind, and I do hereby swear and attest to that while in the company of one Carolyn A. Spalding [sic], on or about the 15th day of June, 1982, I, without her permission or acquiesence [sic] or knowledge did steal a number of pills, from her personal effects, that this number of pills was believed to be Ten (10) pills, that these pills to the best of my knowledge

were a prescription drug known as Desoxyn, that I then sold these pills to a women [sic] I have known as "Dee", that I sold these pills that I believed to be Desoxyn to "Dee" for one hundred dollars and no/100 ($100.00), that I knew then at the time of the sale, that this woman known as "Dee" was a member of the Jefferson Parish Sheriff [sic] Department.

I again wish to swear and attest that Mrs. Carolyn A. Spalding [sic] never gave me permission to take the above described pills that were in her possession, and that I stole these pills from her personal effects without her knowledge or acquiescence.

I again wish to state that this statement has been given of my own free will, absent coercion, threats, or intimidation of any kind.

This statement being given this 22 day of June, 1982.

s/ KEVIN MICHAEL MORRIS

s/ CAMERON GAMBLE
NOTARY PUBLIC

s/ Illegible
WITNESS

s/ Illegible
WITNESS

s/ CAMERON GAMBLE
Notary Public, Parish of Orleans
State of Louisiana
My Commission is Issued for Life.